



Secretary's Order No. 2006-A-0009

Re: Facility-Wide Corrective Action Permit for the E. I. DuPont de Nemours and Company Facility in Edge Moor, Delaware

Date of Issuance: March 13, 2006

Effective Date: March 13, 2006

Under the authority granted the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") under *7 Del C. Chapters 60 and 63* to issue permits, the following findings, reasons and conclusions are entered as an Order of the Secretary. This Order considers the draft permit for corrective action to be undertaken at E.I. DuPont de Nemours and Company's ("DuPont") facility at Edge Moor, New Castle County ("Facility"). A 2001 Delaware Superior Court Consent Decree required that a corrective action be undertaken at the Facility pursuant to the *Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §§ 6901 et seq.* ("RCRA"), and similar state law in *7 Del C. §6300 et seq.*

Based upon requests for a public hearing, the Department held a public hearing in order to hear comments from the public before deciding to issue a final corrective action permit. The Department's Hearing Officer presided over the public hearing, developed a record of decision, and prepared a report of recommendations, dated February 22, 2006 ("Report"), a copy of which is appended to this Order and incorporated herein.

The Report recommends issuance of the draft corrective action permit as a final corrective action permit. The Report concludes that the draft permit is consistent with the law, the Department's policies and regulations, and recommends its issuance as a final corrective action permit. The Report also recommends that the Department provide more opportunities for public participation during the corrective action, in the manner outlined in the Department's Division of Air and Waste Management's ("DAWM") February 14, 2006, memorandum.

I adopt the Report. I particularly agree with the Report's recommendation to adopt DAWM's February 14, 2006, memorandum on providing additional opportunities for public participation. This memorandum expresses DAWM's intent to provide public participation beyond the level required by law or regulations. I commend DAWM for providing the opportunities for public participation during the draft permit process, including holding a public workshop, and assisting the public during the public hearing. The Department has listened to the public's concerns, and it will continue to listen to concerns as the corrective action moves forward. The Department will benefit from the future opportunities for public participation because the area residents and others may have invaluable knowledge to assist in the corrective action process investigations of the Facility. Thus, the Department welcomes the public's participation in the corrective action at the Facility and the RCRA investigations to be undertaken based upon the corrective action permit authorized by this Order.

In sum, as more fully described in the reasons and findings in the Report, I adopt and direct the following as a final order of the Department:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
2. The Department provided adequate public notice of the proceeding and the public hearing, which was held in a manner required by the law and its regulations;
3. The Department considered all timely and relevant public comments in making its determination;
4. The record supports the issuance of a final corrective action permit based upon the draft corrective action permit that was the subject of the public hearing, and such minor modifications and reasonable conditions that the Department official delegated to prepare the permit determines are necessary to protect the environment and public health;
5. The duly authorized Department official shall issue a permit consistent with this Order, and allow the corrective action to begin and progress with investigations, including outside of the Facility if warranted;
6. The Department shall provide opportunities for public participation, as outlined in the February 14, 2006, memorandum from the Division of Air and Waste Management; and
7. The Department shall provide notice of this Order to the persons affected by this Order, as determined by the Department, including those who participated in the hearing process.

s/John A. Hughes

John A. Hughes
Secretary

HEARING OFFICER'S REPORT

TO: The Honorable John A. Hughes
Secretary, Department of Natural Resources and Environmental Control

FROM: Robert P. Haynes, Esquire
Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Facility-Wide Corrective Action Permit for the E. I. DuPont de Nemours and Company Facility in Edge Moor, Delaware

DATE: February 22, 2006

I. BACKGROUND AND PROCEDURAL HISTORY

This Report of the Hearing Officer is submitted to the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") in order to review the public comments on the Department's draft corrective action permit issued for public comment on July 31, 2005. The draft corrective action permit, if issued as a final permit, will authorize corrective action to be undertaken at E.I. DuPont de Nemours and Company's ("DuPont") facility located at 104 Hay Road, Edge Moor, New Castle County ("Facility").

The corrective action of the Facility is required by a court approved consent decree, dated November 2, 2001, in *DiPasquale v. E.I. DuPont de Nemours and Company, Delaware Superior Court C.A. 01C-10-288 CHT* ("Consent Decree"). The Consent Decree required that DuPont undertake a corrective action, which is a complex and lengthy environmental program undertaken pursuant to the federal statute known as the *Resource Conservation and Recovery Act of 1976, as amended*, 42 U.S.C. §§ 6901 *et seq.* ("RCRA") and state law in 7 Del. C. §6300 *et seq.*

On December 31, 2001, DuPont submitted, as required by the Consent Decree, a corrective action plan ("Plan"), but the Department did not accept this Plan as complete. Instead, the Department required DuPont to further investigate and research conditions at the Facility, particularly with additional information on various areas of interest where possible contaminants

may be located. On November 23, 2004, DuPont submitted a final revised Plan, which the Department determined was complete.¹ Consequently, the Department approved the Plan in a December 2, 2004, letter, and confirmed, in a December 8, 2004, letter, that DuPont had elected to seek a permit for the corrective action, as opposed to a corrective action order.

Under the procedure for a corrective action permit, the Department prepared a draft corrective action permit. Notice of this draft permit was published for public comment beginning on July 31, 2005, and ending forty-five days later. This notice also informed the public with the opportunity to request a public hearing on the draft permit. The Department timely received three public comments, two of which requested a public hearing and one requested a public workshop. The Department granted the requests and provided thirty days' notice of the public workshop and the public hearing.

I attended the November 9, 2005, public workshop as an observer and presided over the November 16, 2005, public hearing. At the public hearing, members of the public requested fourteen additional days to submit comments and also to continue the public hearing. I granted the request to keep the public hearing record to remain open for an additional fourteen days, or until November 30, 2005. I denied the request to continue the public hearing because everyone had an opportunity to speak at the public hearing, although the length of some comments was curtailed after a reasonable time.

The Department received numerous additional public comments during this extended public comment period, many of which sought to keep the public comment record open beyond November 30, 2005. In total, the Department allowed public comments to be submitted from July 31, 2005, through November 30, 2005. I did not grant the requests to keep the public comment record open beyond November 30, 2005.

¹ DuPont previously had submitted an August 15, 2003, revision that also did not satisfy the Department's experts.

II. SUMMARY OF THE RECORD

The public hearing record contains a one hundred and twenty-five page verbatim transcript of the public hearing, and documents, marked as Exhibits (“Ex.”), which were admitted into the record as hearing exhibits. In addition, the Department received numerous written public comments for the public hearing record, particularly in the period allowed after the public hearing. Rachel Colella, an Environmental Scientist in DAWM’s Solid and Hazardous Waste Management Branch (“SHWMB”), provided a brief background explanation of the corrective action permit process, and she and other Department representatives were present to answer questions. DuPont representatives were present at the Department’s request.

Based upon my review of the public hearing record, I summarize the public comments as raising the following issues: 1) whether DuPont’s Plan adequately identified all areas of possible contamination, or areas of interest, at the Facility; 2) whether the Department will require adequate sampling and testing for contaminants at the Facility, including outside of the Facility in the nearby residential neighborhoods; 3) whether the Department will provide more opportunity for public participation in the corrective action process; 4) whether the Department followed the proper procedures in preparing the draft corrective action permit without DuPont submitting an application for the permit; and 5) whether the public hearing provided an adequate amount of opportunity to public comment.

This Report is based upon a record of decision, which includes the public hearing record consisting of the hearing transcript, the written documents submitted as exhibits at the hearing, and the written comments received during the public comment period that began July 31, 2005, and ended on November 30, 2005. In addition, the record of decision includes my review of the Department’s files, my legal research and the technical advice and assistance provided by

technical experts within the Department. Consequently, I find and recommend that the record of decision is adequate for the Secretary's final decision based upon my recommendations.

III. DISCUSSION AND REASONS

The above summary of the public hearing record indicates that many of the public comments were concerned with the Department's corrective action procedure. These comments are understandable because the Department's corrective action permit procedure is different from the procedure the Department follows for many of its permits.

The Department in this proceeding is considering the public comments on a draft of a RCRA corrective action permit. DAWM's SHWMB prepared and issued the draft permit for public comment on July 31, 2005. Consequently, at the public hearing the Department's experts formally were on the record as recommending that the Secretary issue the draft permit as a final permit. The Department's experts at the public hearing were not neutral, but had formed an opinion and were prepared to defend the draft permit. The Department also was present to listen to the public and to make changes to the draft permit when appropriate. Thus, the Department's technical representatives at the November 16, 2005, public hearing assumed the role often reserved for a permit applicant, namely, to be the primary responsible participant at the hearing to answer the public's questions.²

I find that the Department's procedures for the draft corrective action permit for the Facility, as reviewed in the above procedural history, properly were based upon the Department's *Regulations Governing Hazardous Waste* ("Regulations"). These Regulations set forth the procedures that the Department must follow, and they were based upon federal procedures because the Department administers corrective action permits under RCRA and the state law governing issuance of permits. 7 Del C. §6004 and §6305 (a)(16).

² The Department does not consider that the public has any legal right to ask questions at a public hearing. Secretary Hughes' policy is to allow reasonable and relevant questioning from the public at public hearings.

As part of the EPA's federal program, the Department must follow EPA's procedures to the extent they provide more protection than afforded by Delaware law. This include the forty-five day public notice period that began on July 31, 2005, which exceeds the otherwise applicable fifteen day period in 7 *Del. C. §6004*. These procedures require that the Department draft a corrective action permit, which is then the subject of public notice and the opportunity for public comment. The opportunity to comment also allows for the opportunity to request a public hearing. Thus, the public comments on the Department's procedure for a corrective action permit really raise questions with and collaterally challenge the Department's Regulations.

One procedural issue that requires additional discussion is the Department's preparation of a draft corrective action permit for the Facility without requiring DuPont to submit a formal application for a permit. The Consent Decree allowed DuPont to elect either a corrective action order or a corrective action permit. DuPont's Plan referred to a corrective action order and not a corrective action permit, but the record indicates that Department's December 8, 2004, letter to DuPont confirmed DuPont's election, as allowed by the Consent Decree, of the corrective action permit procedure. DuPont's counsel at the public hearing when this issue was raised provided further clarification that the Plan's reference to a corrective action order should have been revised to reflect this election.

I find nothing wrong under these factual circumstances of this case with the Department's procedure whereby the Department prepared a draft permit without requiring DuPont to prepare and submit a formal application for a permit. The purpose of a permit application is a procedural step for an applicant to voluntarily seek a permit. In this case, the DuPont was required by the Consent Decree to undertake the corrective action at the Facility, and the requirement of an application was not needed. There simply was no need for DuPont to voluntarily 'apply' for a

permit when the Consent Decree already mandated that the corrective action was required.³ To impose a requirement for DuPont to submit an application in this case would be a needless administrative step that would only unduly delay the corrective action.

I find that the Department properly relied on the Plan for the information needed to draft the corrective action permit. Indeed, at the public hearing the Department's technical experts confirmed that the Plan was similar to an application. The public had the opportunity to comment on the Plan during the public hearing process. The Plan was admitted into the hearing record, and was the subject of most of the public's comments. I find that, as a practical matter, the Department did not need DuPont to submit an application, and that the Plan served the an application's purpose of providing the Department with the necessary information to prepare the draft permit. I reject the public comments that question lack of an application and find that the public had an adequate opportunity during the public hearing process to provide the Department with comments on the Plan as if it was an application.

DuPont's Plan and its role in the corrective action process also was the subject of considerable public comments. These comments were based upon the mistaken belief that the Department's approval of the Plan was premature because the Plan was not as thorough as it should have been. First, the Department shares the public's concern with the need for the best possible information in the Plan. The Department's concern is shown by the three year review of the Plan. The Department worked with DuPont to improve the Plan in order to obtain the best possible information reasonably available in order to prepare the draft permit. The Department determined that the Plan was sufficiently complete to allow the Department to prepare the draft corrective action permit. The Department's decision to accept the Plan as complete was made with the knowledge that information still was missing, but that the Plan provided a sufficient

³ The Consent Decree was a negotiated settlement of a pending civil enforcement action, but the Consent Decree is a judicial mandate binding on DuPont and the Department.

amount of background information to allow the Department to prepare and issue a draft corrective action permit for public comment. While not necessary to this recommendation, in hindsight I find the Department's decision to accept the Plan was reasonable.

The Department's approval of the Plan in 2004 does not in any way limit the Department's future investigation of the Facility. Instead, the approval was a procedural step to allow the corrective action process to move forward and for the Department to prepare the draft corrective action permit. As noted above, many of the comments pointed to the perceived inadequacies in DuPont's Plan. The corrective action permit, if issued, will authorize the future investigation of the Facility. This investigation is the subject of voluminous EPA guidance documents. The EPA regulatory process, as adopted by the Regulations, entails a lengthy, structured, formal environmental investigation.

The Department's technical experts at the hearing described the investigation process, and at my request provided a further description in DAWM's February 14, 2006 memorandum. The corrective action permit is the regulatory means to commence the thorough investigation that most of the public comments support. The corrective action permit will allow the investigation of any hazardous substances to be undertaken, including the authority to investigate any migration of the Facility's hazardous substances offsite. DAWM's February 14, 2006, memorandum indicates that the permit will allow full and complete testing of the Facility, including the investigation of any contaminants located on the Facility and outside of the Facility pursuant to Permit Condition II.K. This response should satisfy the public concerns that the corrective action will be thorough and will include corrective action outside of the Facility when determined by the investigation to be warranted based upon sampling and testing. The RCRA Facility Investigation also should satisfy the public's concern with a thorough investigation of the Facility. This Facility Investigation will follow EPA's well-established testing and sampling

protocols for all such RCRA investigations. The Facility will be the subject of extensive testing and sampling pursuant to established federal guidelines and protocols in order to discover all contaminants that may be present. These are the investigative procedures that the draft corrective action permit proposed, and explain why the draft permit should be issued as a final permit in order for the steps may be taken. The permit will allow the subsequent multi-phase RCRA investigation to go forward, and nothing in the Plan is binding on the future investigation and all relevant missing or incomplete in the Plan will be investigated as part of the RCRA corrective action permit until all necessary information is known.

The public comments on the Department's procedures also addressed the amount of opportunity for public comment. I find and conclude that the opportunity for public comment provided by the Regulations far exceeded the time and opportunity for public comment otherwise required by state law. Under Chapter 60 of Title 7 of the Delaware Code, most Department permit applications only require only fifteen or twenty days for the public to comment on the subject of a public notice. In this draft permit, the public comment period was from July 31, 2005, until November 30, 2005, or well in excess of the minimum period allowed by state law. The only discretionary time period was my grant of the requested fourteen day extension. This extended period was consistent with the federal program, as reflected in the Regulations.

In addition, I find that the public had an adequate amount of time at the public hearing. All persons had an opportunity to present comments, although I imposed time restrictions on the length of the public comments. I consider the time restrictions were necessary given the limits on the use of the building and reasonable to allow everyone present with the opportunity to present succinct comments. In addition, I granted an extended public comment period after the public hearing. Most of the written comments submitted after the hearing requested additional time to

present public comments, but they provided no adequate justification for supporting any more extension of the public comment period. At the public hearing, I specifically requested specific comments on the draft permit, but none of the comments submitted provided any requested change to the draft permit. The Department's experts also have considered the public comments and do not recommend any change to the draft permit.

I requested DAWM to provide its opinion and advice on possible future public participation opportunities during the course of the corrective action process. DAWM's February 14, 2006, memorandum sets forth the intent of the DAWM, as the responsible Division within the Department for regulating the corrective action, to provide formal and informal public participation in the Facility's corrective action process. This memorandum outlines the opportunities for public participation consistent with the Department's obligation to follow its Regulations. The memorandum also indicates that DAWM is committed to providing public participation throughout the process, both informally and formally when appropriate. The DAWM memorandum indicates reasonable steps for the Department to undertake in the future for this corrective action, and I recommend that the Secretary adopt the DAWM memorandum as the Department's intention to provide more public participation opportunities in the future for this corrective action. This recommendation will not require any change to the draft permit because the permit will apply only to DuPont. The additional public participation will entail the Department's internal policies, and not DuPont, although the Department will expect DuPont to cooperate in any future public participation to the extent its cooperation is needed.

In sum, DAWM considered the public comments and has advised me that its recommendation is that the draft permit does not need to be changed in response to the public comments. My review concurs in this technical expert advice. Indeed, the corrective action permit will address the public concerns with a more thorough investigation leading to

remediation as determined necessary after the investigation. I agree and recommend that the Secretary issue a corrective action permit based upon the draft permit. I also recommend that the Secretary adopt DAWM's February 14, 2006, memorandum as the intent of this secretary to provide more public participation opportunities than otherwise required by law or Regulations.

IV. RECOMMENDED FINDINGS AND CONCLUSIONS

Based on the record developed, I find and conclude that the record supports approval of the issuance of the draft corrective action permit as a final corrective action permit. In conclusion, I recommend the Secretary adopt the following findings and conclusions:

- 1.) The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
- 2.) The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
- 3.) The Department held a public hearing in a manner required by the law and regulations;
- 4.) The Department considered and responded to all timely and relevant public comments in making its determination;
- 5.) The Department's draft corrective action permit is consistent with the law, regulations, and the Department's policies and should be issued as a final corrective action permit in order to begin the RCRA corrective action at the Facility as required by the Consent Decree;
- 6.) The Department intends to provide public participation opportunities, as outlined in DAWM's February 14, 2006, memorandum, for the Department's administration of this corrective action permit, and that

7.) The Department shall provide adequate notice of the final action to those affected persons and publish notice in a manner required by law or regulations, including the right to appeal the final decision.

s/Robert P. Haynes
Robert P. Haynes, Esquire
Hearing Officer

**SOLID AND HAZARDOUS WASTE MANAGEMENT BRANCH
MEMORANDUM**

TECHNICAL REVIEW

TO: Robert P. Haynes, Hearing Officer

THRU: James D. Werner, Division Director, DAWM
Nancy C. Marker, Environmental Program Manager II, SHWMB

FROM: Rachel L. Colella, Environmental Scientist, SHWMB

DATE: February 14, 2006

SUBJECT: DuPont Edge Moor Facility Corrective Action Permit

REFERENCE: DED000800284; File Code: 40

In your memo of January 31, 2006, you asked the Division of Air and Waste Management (DAWM) to address issues raised during the public hearing concerning the Corrective Action Permit for the DuPont Edge Moor Facility. We have repeated (in *italics*) the two questions outlined in your memo and have provided our comments below:

1. *What are the other opportunities for the public to participate during the RCRA Corrective Action permit procedures? Does DAWM/SHWMB recommend any other forms of public participation other than required by the law? If so, please explain the other recommended ways for the participation.*

SHWMB Response:

The Department is committed to keeping the public updated throughout the corrective action process. The SHWMB has established a specific mailing list for members of the public interested in the DuPont Edge Moor site; those on the list will receive individual notification of public participation opportunities, in addition to the public notice(s) posted in newspaper and radio ads. If at any time during the corrective action process, the public has questions or concerns about the activities at DuPont Edge Moor, they can contact the SHWMB Project Officer for this site, who may be able to meet with or speak to people on an individual or group basis regarding the corrective action activities done to date. All work completed as part of the corrective action process are considered public documents and the Department encourages the public to review these materials through the FOIA process.

DuPont has also committed to presenting updates on the corrective action process at their regular Community Affairs Panel (CAP) meetings, allowing community members to participate in corrective action discussions. The CAP consists of representatives from industry and government agencies, as well as local residents and representatives from community civic associations and other stakeholder groups.

In addition to these public outreach activities during the RCRA Corrective Action process, there is also a formal opportunity for public participation. This formal public participation opportunity will occur following completion of the RCRA Facility Investigation (RFI) and

Corrective Measures Study (CMS) to solicit public comments after the Department prepares a “Statement of Basis”, describing the proposed remedies for this site. This “Statement of Basis”, along with other relevant materials in the administrative record, will be available for public review and written comments for thirty (30) days.

The Department will consider the need for formal public participation meetings or hearings, based on whether any public request for a formal meeting or hearing is submitted. In addition to this formal meeting process, the Department will reply to any questions or comments raised. After considering all of the comments and information submitted during the public comment period, the Department will issue a “Record of Decision”, identifying the final selected remedy that will be implemented during the Corrective Measure Implementation (CMI) phase as described in Section II.G. of the Corrective Action Permit.

2. *What is the significance of expanding the areas of interest beyond those now identified and explain what events would trigger that to occur? Please use a theoretical example to explain how DAWM would determine if offsite sampling/testing is needed.*

SHWMB Response:

The areas of interest currently identified at the site are based on existing information compiled during the RCRA Facility Assessment (RFA) and are considered a starting point in the corrective action process. Throughout the investigations, the Department may discover other areas of interest as more information becomes available. For example, if during an investigation contamination is discovered but can not be traced back to any area of interest already identified, then the Department would make a determination to include this new area in the corrective action process. The newly identified areas of interest would be incorporated into the corrective action process pursuant to Permit Condition II.K.

The need for offsite sampling or testing could occur if there is evidence that contamination from one of the areas of interest may have affected an offsite receptor. For example, during an investigation, the Department could discover an area of contaminated groundwater. Following this initial discovery, the Department would require further investigation to determine the extent of the contaminant plume. If it appeared that this contaminant plume migrated offsite, then the Department would extend the investigation beyond the facility boundary in an effort to capture the entire plume.